

REMARKS

This communication responds to the Final Office Action mailed December 22, 2005 and to the Advisory Action mailed May 8, 2006.

In the present communication, applicant has amended claims 5,12, 20, 26, 39 and 42. No new subject matter has been added to the claims.

Support for the amendments to the claims can be found in the specification at least at page 3, line 4; page 5, line 19; and page 6, lines 8-12.

Claims 13, 14, 27, 28, 43, and 44 have been canceled. Claims 1, 4, 16, 19, and 29-35 were previously canceled. Therefore, claims 2-3, 5-12, 15, 17, 18, 20-26, and 36-42 are pending.

The §§ 112, second paragraph and 103(a) rejections of the claims are respectfully traversed in view of the above amendments and the below discussion.

The amendment of the claims is to help more distinctly claim the invention and is not an acquiescence to any pending rejection. Applicant reserves the right to present the original claims in this or a continuation application. No prejudice shall be inferred by the amendments.

Rejection of Claims 6, 12, 26, 38 and 42 under 35 U.S.C. § 112, second paragraph

Claims 6, 12, 26, 38, and 42 were rejected under 35 U.S.C. 112, second paragraph. The § 112 rejection of the claims is respectfully traversed. However, claims 6, 12, 26, 38, and 42 were previously amended in the reply filed February 22, 2006, without adding new matter, in order to overcome the § 112, second paragraph rejection of the claims. It is noted that the claim amendments submitted on February 22, 2006 were entered.

Therefore, reconsideration and withdrawal of the § 112 rejections are requested.

Rejection of Claims 1-2, 3, 5-15, 17, 18, 20-28 and 36-44 under 35 U.S.C. § 103(a)

Claims 1, 2, 3, 5-15, 17, 18, 20-28 and 36-44 were rejected under 35 U.S.C. 103(a) as being unpatentable over the Office Action's assertion of admitted prior art in view of U.S. Patent

No. 6,562,385 Neumann (hereinafter “Neumann”) in view of U.S. Patent No. 4,623,542 Wallin et al. (hereinafter “Wallin”).

The § 103(a) rejection is respectfully traversed for at least the following reasons, which are in addition to the reasons for traverse filed in the Response dated February 22, 2006.

The present invention discloses a pie filled with frozen fruit and teaches a method for manufacturing a pie filled with frozen fruit that includes the steps of mixing pie dough ingredients, forming the pie dough into a pie shell, adding individually quickly frozen (“IQF”) fruit into the pie shell, depositing a suspension over the IQF, applying a top sheet of pie dough over the suspension, IQF fruit and pie shell which completes the frozen fruit filled pie product assembly, transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product. The method described above includes additional unique features including that the IQF fruit remains frozen throughout the manufacturing process, and that the suspension is made of a range of about 38% to about 88% liquid sweetener, a range of about 5% to about 55% dry sweetener, a range of about 4% to about 15% food starch, and a range of about 0.01% to about 5% food gum. This unique composition allows the suspension to exhibit the following unique properties: the suspension in the initial frozen state exhibits a reduction of viscosity when exposed to heat causing IQF fruit to disperse in the suspension, and exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit.

The present invention is also directed toward a method for suspending frozen fruit in a pie filled with frozen fruit having ingredients of various specific gravities which includes the following steps: mixing a first set of ingredients to form a suspension which includes a range of about 38% to about 88% liquid sweetener, a range of about 5% to about 55% dry sweetener, a range of about 4% to about 15% food starch, and a range of about 0.01% to about 5.0% food gum, mixing a second set of ingredients to create pie dough, forming a portion of said pie dough into a pie shell, adding individually quickly frozen (“IQF”) fruit into the pie shell, adding the suspension over the IQF fruit in the pie shell, the suspension used to suspend said IQF fruit in a uniform distribution upon baking of the pie filled with frozen fruit; and applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said IQF fruit remains frozen throughout the manufacturing process,

transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product, wherein the suspension in the initial frozen state exhibits a reduction of viscosity when exposed to heat allowing IQF fruit to disperse in the suspension, and wherein the suspension exhibits an increase of viscosity when exposed to temperatures above 120° Fahrenheit.

As can be seen, the method for forming a suspension also includes the unique features described above in which the IQF fruit remains frozen throughout the manufacturing process. This is also an advantage over the prior art because IQF fruit is thawed one time, i.e., once it is baked in a consumer's oven. Because the IQF fruit does not thaw, flavor cannot escape the fruit pieces, and instead flavor is locked-in. Next, IQF fruit that remains frozen prevents seepage of water from the fruit into the pie dough, which can make the piecrust soggy. Further, IQF fruit that remains frozen during production does not need to be re-frozen, which reduces energy costs attributed to the process of freezing finished pie products.

The above-mentioned benefits provided by the present invention provides the consumer with a finished pie having characteristics desirable to the customer. In addition, use of the above methods reduces production times and energy costs compared to typical methods. Thus, profitability of producing pie products is increased.

Now the references of record are considered.

In contrast to the present invention, Neumann discloses a food product with flavoring and a method for producing the same.

Wallin, in contrast to the present invention, discloses a high stability, high flavor, breakfast pastry and method for preparing the same.

Neumann and Wallin, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention.

In particular, the present invention includes a suspension for a frozen fruit pie.

In contrast, the Neumann reference fails to disclose or suggest a suspension for a frozen fruit pie.

The Wallin reference too fails to disclose or suggest suspension for a frozen fruit pie.

Therefore, the Neumann reference and the Wallin reference, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art to produce a frozen fruit pie.

In addition, the present invention includes applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said **IQF fruit remains frozen throughout the manufacturing process.**

In contrast, Neumann discloses adding flavoring to food products that have been pre-baked or adding flavoring inclusions to unbaked cereal-based products. Neumann fails to teach or suggest to one of ordinary skill in the art application of a top sheet of pie dough over IQF fruit which remains frozen throughout the manufacturing process. Because of this, Neumann fails to provide any motivation or expectation of success to one of ordinary skill in the art that the flavoring is added to anything that is frozen throughout the manufacturing process.

Wallin, in contrast to the invention, discloses adding flavoring to unbaked dough pads and does not mention that the dough pads or the flavoring is frozen throughout the manufacturing process. Wallin fails to teach or suggest to one of ordinary skill in the art applying a top sheet of pie dough over IQF fruit which remains frozen throughout the manufacturing process. Because of this, Wallin fails to provide any motivation or expectation of success to one of ordinary skill in the art that the flavoring is added to anything that is frozen throughout the production process.

Neumann and Wallin, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, the present invention's applying a top sheet of pie dough over the suspension, IQF fruit and pie shell to complete the frozen fruit filled pie product assembly, wherein said **IQF fruit remains frozen throughout the manufacturing process.**

Moreover, the present invention includes transporting the frozen fruit filled pie product in an initial frozen state; and baking the frozen fruit filled pie product.

Neumann discloses adding flavoring toppings to cereal-based products that are baked and shipped. Neumann fails to teach or suggest to one of ordinary skill in the art transporting the frozen fruit filled pie product in an initial frozen state. Because of this, Neumann fails to provide any motivation or expectation of success to one of ordinary skill in the art an unbaked product that is transported in an initial frozen state.

Wallin discloses cooking a pastry product before shipping. Wallin fails to teach or suggest to one of ordinary skill in the art transporting the frozen fruit filled pie product in an initial frozen state. Because of this, Wallin fails to provide any motivation or expectation of success to one of ordinary skill in the art an unbaked product that is transported in an initial frozen state.

Therefore, the Neumann reference and the Wallin reference, alone or in combination, fail to disclose, suggest, or provide any motivation or expectation of success to one of ordinary skill in the art, transporting a frozen fruit filled pie product in an initial frozen state.

It is well settled that it is not proper to selectively extract individual elements from the different contexts of different references and then combine those selectively extracted elements to arrive at a claimed combination. Rather in considering the elements within the references, the references must be considered as a whole, it being impermissible to pick and choose from a reference only so much of it as will support a given position. *In re Wesslau*, 353, F.2d 238, 147 USPQ 391 (CCPA 1965); *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). There is a rigorous requirement that there must be some motivation, suggestion or teaching of the desirability for selecting the elements and combining those elements in the specific combination of the invention, and the motivation, suggestion or teaching must be disclosed in the reference(s). *In re Kotzab*, 217 F.3d 1365, 54 USPQ2d 1308, 1316 (Fed. Cir. 2000); *In re Oetiker*, 977 F.2d 14343, 24 USPQ2d 1443 (Fed. Cir. 1992). In the absence of such motivation, suggestion or teaching, it is immaterial that some, or even all, of the elements in a specific combination of an invention are known in the art. As clearly stated in *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453 (Fed. Cir. 1998):

As this court has stated, “virtually all [inventions] are combinations of old elements.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713F2d 693, 698,218 U.S.P.Q. (BNA) 865, 870 (Fed. Cir. 1983); *see also Richdel, Inc. v. Sunspool Corp.*, 714 F2d 1573, 1579-80, 219 U.S.P.Q. (BNA) 8, 12 (Fed. Cir. 1983) (“Most, if not all, inventions are combinations and mostly of old elements.”). Therefore an examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentability of the claimed invention. Such an approach would be “an illogical and inappropriate process by which to determine patentability.” *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1570, 38 U.S.P.Q.2D (BNA) 1551,1554 (Fed. Cir. 1996).

and:

To prevent the use of hindsight based on the invention to defeat patentability of the invention, this court requires the examiner to show a motivation to combine the references that create the case of obviousness. In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed.

In the present case, the examiner believes that the recitations of the claims are taught by a combination of the cited references. However, “there is no basis for concluding that an invention would have been obvious solely because it is a combination of elements that were known in the art at the time of the invention.” *Smiths Ind. Medical Sys., Inc. v. Vital Signs, Inc.*, 183 F.3d 1347 (Fed. Cir. 1999) (*referencing Fromson v. Advance Offset Plate, Inc.*, 755 F.2d 1549, 1556 (Fed. Cir. 1985)). Furthermore, the Wallin and Neumann references cited in the December 22, 2005 Office Action do not provide motivation, suggestion or teaching, and no showing has been

made otherwise identifying in the references such a motivation, suggestion or teaching, for selecting elements from the cited references to render obvious the method recited in the claims, and the invention cannot be used as a blueprint for identifying a suggestion or motivation. As stated in *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d (BNA) 1614 (Fed. Cir. 1999):

Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. See, e.g., *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2D (BNA) 1225, 1232 (Fed. Cir. 1998) (describing “teaching or suggestion or motivation [to combine]” as an “essential evidentiary component of an obviousness holding”); *In re Rouffet*, 149 F.3d 1350, 1359, 47 U.S.P.Q.2D (BNA) 1453, 1459 (Fed. Cir. 1998) (“the Board must identify specifically... the reasons one of ordinary skill in the art would have been motivated to select the references and combine them”); *In re Fritch*, 972 F.2d 1260, 1265, 23 USP.Q.2D (BNA) 1780, 1783 (Fed. Cir. 1992) (examiner can satisfy burden of obviousness in light of combination “only by showing some objective teaching [leading to the combination]”); *In re Fine*, 837 F.2d 1071, 1075, 5 U.S.P.Q.2D (BNA) 1596, 1600 (Fed. Cir. 1988) (evidence of teaching or suggestion “essential” to avoid hindsight); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 297, 227 U.S.P.Q. (BNA) 657, 667 (Fed. Cir. 1985) (district court's conclusion of obviousness was error when it “did not elucidate any factual teachings, suggestions or incentives from this prior art that showed the propriety of combination”). See also *Graham*, 383 U.S. at 18, 148 U.S.P.Q. (BNA) at 467 (“strict observance” of factual predicates to obviousness conclusion required). Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight. See, e.g., *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138, 227 U.S.P.Q. (BNA) 543, 547 (Fed. Cir. 1985) (“The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time.”). In this case the Board fell into the hindsight trap.

Nonetheless, the Examiner uses the present invention as a blueprint for piecing together Neumann and Wallin because neither Neumann nor Wallin disclose or suggest a method for manufacturing a *pie filled with frozen fruit* as recited by the independent claims. Accordingly, one of ordinary skill in the art would not look to Neumann or Wallin when attempting to develop a method for manufacturing *a pie filled with frozen fruit*. Therefore, the Examiner has used impermissible hindsight in the Office Action of December 22, 2005, and has failed to establish a *prima facie* case of obviousness.

It is believed that all of the issues raised in the Office Action have been addressed herein. Should the Examiner maintain any of the rejections of any of the pending claims, it is respectfully requested that it be pointed out with particularity how the cited reference(s) meet each and every term of each claim with respect to which rejection is maintained, and if the rejection is based on obviousness, identification of the specific motivation, suggestion or teaching in the art for combining elements in the specific combination of the invention.

For the above reasons, reconsideration and withdrawal of the § 103 rejection is requested.

CONCLUSION

This application now stands in allowable form, and reconsideration and allowance are respectfully requested.

A petition for an extension of time accompanies this paper, along with a check in the amount of \$1020.00 for the petition fee. The commissioner is also authorized to charge any additional fees, including extension fees or other relief that may be required, or credit any overpayment to Deposit Account No. 04-1420.

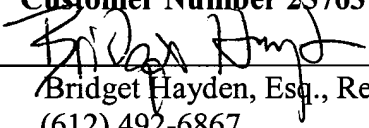
Respectfully submitted,

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Date: June 22, 2006

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